UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

FRED M. POWELL,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 95-338-P-DMC***
	)	
CITY OF LEWISTON, et al.,	***)***	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT[1]

The plaintiff asserts federal and state civil rights claims and related state-law tort claims in connection with his arrest by Officer Ronald E. Giroux of the Lewiston Police Department. Specifically, the plaintiff asserts, pursuant to 42 U.S.C. § 1983 and section 4682 of the Maine Civil Rights Act, 5 M.R.S.A. § 4681 *et seq.*, that excessive force was used in connection with his arrest in violation of the United States and Maine Constitutions, and that, pursuant to Maine common law, the defendants are liable to him for negligence, assault and battery and negligent infliction of emotional distress. He also presses a claim under 15 M.R.S.A. § 704 for warrantless arrest performed in a wanton or oppressive manner. Defendants Giroux and the city of Lewiston move for summary judgment on all counts.[2] For the reasons set forth below, I grant the defendants' motion

[1] *Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.*

[2] Although the complaint also names Officer Michael Moyer as a defendant, the plaintiff (continued...)

in its entirety.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132

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[2] (...continued)
concedes that Moyer committed no relevant tortious actions toward him. Plaintiff's Opposition to Motion for Summary Judgment and Incorporated Memorandum of Law (Docket No. 8) ("Plaintiff's Memo.") at 2 n.2. Thus, summary judgment is entered in favor of Moyer on all counts.

L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e); Local R. 19(b)(2).

II. Factual Context

Viewed in the light most favorable to the plaintiff, the summary judgment record reveals the following material facts: On the afternoon of January 5, 1995, Officer Ronald E. Giroux of the Lewiston Police Department was dispatched to a domestic violence call. Affidavit of Ronald E. Giroux ("Giroux Aff.") ¶¶ 1-2, Exh. A to Defendants' Statement of Uncontroverted Facts ("Defendants' SMF") (Docket No. 6). Officer Michael Moyer also responded to the call. *Id.* ¶ 2. Upon their arrival, the plaintiff's wife stated that she had punched the plaintiff in the face during an argument. *Id.* ¶ 3. Moyer arrested her for a domestic violence assault. *Id.* The plaintiff then admitted to Giroux that he had grabbed his wife and pushed her to the floor, whereupon Giroux placed him under arrest for a domestic violence assault. *Id.* ¶¶ 4-5. Giroux handcuffed the plaintiff with no difficulty. *Id.* ¶ 5. The plaintiff, who had alcohol on his breath and slurred speech, appeared highly intoxicated to Giroux. *Id.* ¶ 4. The plaintiff contents that, although intoxicated, he was "still maintainable." Deposition of Fred M. Powell ("Powell Dep. I") at 18, Exh. A to Affidavit of David J. Van Dyke, Esq. (Docket No. 10).

After he was handcuffed, the plaintiff began to argue with his wife and struggle against the handcuffs, Giroux Aff. ¶ 6, although he never resisted arrest, Powell Dep. I at 54-55. Moyer and Giroux decided to separate the couple while awaiting the arrival of a relative to take custody of their minor children. Giroux Aff.¶ 6. Giroux escorted the plaintiff down the stairs from the plaintiff's apartment to his police cruiser. *Id.*

Giroux used a technique called an "arm bar," wherein he placed his right hand up under the

plaintiff's handcuffed wrists and against the plaintiff's back, between his shoulder blades. *Id*. This technique afforded Giroux sufficient control and leverage over the plaintiff to ensure he would exit the apartment, transit several flights of stairs, and enter the police cruiser. *Id.* ¶ 11. At they left the apartment the plaintiff attempted to spit on Giroux, who then used his left arm to position the plaintiff's face away from him. *Id.* ¶ 6. However, at no time did the plaintiff resist going down the stairs. Powell Dep. I at 21.

Giroux was slightly ahead of the plaintiff as he led him down the stairs, far enough ahead so that the plaintiff's body was turned as he tried to keep up with Giroux. *Id.* at 24-25. Giroux was trying to lead the plaintiff faster than he could walk, effectively pulling him down the stairs by his arms and wrists. *Id.* at 21, 54. He was also applying upward pressure on the handcuffs. *Id.* at 22. The plaintiff testified that Giroux seemed to be picking him up and trying to bring him down the stairs, and that he was bumping off the sides of the stairwell. *Id.* at 21. This procedure was very painful to the plaintiff, and he complained to Giroux that he was pulling and pushing him down the stairs. *Id.* at 23, 41.

Just before reaching the first floor, the plaintiff lost his balance due, in part, to the way Giroux was pulling him. *Id.* at 25, 56. Giroux, still holding the plaintiff by his cuffed hands, kept the plaintiff from falling down. Deposition of Fred M. Powell, Exh. C to Defendants' SMF ("Powell Dep. II") at 29. The plaintiff believes that this was the point at which his wrist was fractured.[3] *Id.*; Plaintiff's Memo. at 4 (unnumbered). Giroux placed the plaintiff in the police cruiser, and the plaintiff felt pain in his wrist. Powell Dep. II at 25. At the plaintiff's request, Giroux loosened the

[3] The defendants concede that the plaintiff suffered a fractured left wrist. Defendants' SMF ¶ 21.

handcuffs, leading the plaintiff to feel somewhat better. *Id.* at 25-26. Giroux did not use any degree of force that he did not believe was necessary to effect the arrest and transport, nor did he use any force simply to inflict pain. Giroux Aff. ¶ 11.

III. 42 U.S.C. § 1983

The Fourth Amendment prohibits law enforcement officers from using unreasonable force to effect an arrest. *See Graham v. Connor*, 490 U.S. 386, 394-95 (1989); *Gaudreault v. Salem*, 923 F.2d 203, 205 (1st Cir. 1990), *cert. denied*, 500 U.S. 956 (1991). In measuring "reasonableness" the court considers the specific facts and circumstances, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Thus, the Fourth Amendment permits police to use the level of force "consistent with the amount of force that a reasonable police officer would think necessary to bring the arrestee into custody." *Gaudreault*, 923 F.2d at 205.

Giroux claims that he is entitled to the qualified immunity afforded government officials performing discretionary functions. This qualified immunity shields government officials from section 1983 liability for alleged constitutional rights violations "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citations omitted). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.* at 639 (citations omitted) (quoting *Harlow*

v. Fitzgerald, 457 U.S. 800, 818, 819 (1982)). The court must conduct a two-step analysis, determining whether the right was clearly established, and, if so, whether a reasonable officer could have believed that the challenged action was lawful in light of the specific circumstances and the information possessed by the officers. *Maguire v. Old Orchard Beach*, 783 F. Supp. 1475, 1480 (D. Me. 1992) (citation omitted).

Grounded in the facts of this case, the qualified immunity inquiry reduces to this: could a reasonable police officer in Giroux's position have though it necessary to use the level of force Giroux did to escort the plaintiff down the stairs? Based on the summary judgment record, I find that a rational jury would answer that question affirmatively.

The plaintiff argues that Giroux pulled him unnecessarily, causing him to lose his balance and fracture his wrist as Giroux held him in the arm bar. In hindsight, it may be that Giroux could have successfully escorted the plaintiff down the stairs without pulling him along or using an arm bar. However, a reasonable police officer could have believed that such measures were necessary to maintain control over him. Given that the plaintiff was intoxicated, the plaintiff and his wife had admitted to assaulting each other, and the plaintiff struggled against the handcuffs and resumed arguing with his wife in the presence of both officers, Giroux was entitled to believe it was necessary to separate the two as quickly as possible. Moreover, the plaintiff's attempt to spit on Giroux as they left the apartment could have suggested a need to control the plaintiff. Thus, Giroux is entitled to qualified immunity on the section 1983 claim. Furthermore, even if the plaintiff had proven a constitutional violation, he has failed to produce any evidence of a municipal policy or custom causally related to the violation. *See Canton v. Ohio*, 489 U.S. 379, 385 (1989) (municipality may only be liable under section 1983 where execution of its policy or custom caused the constitutional

violation at issue). Accordingly, Giroux and the city of Lewiston are entitled to summary judgment on the plaintiff's section 1983 claims.

IV. State-Law Claims

A. Discretionary Function Immunity

Giroux claims that 14 M.R.S.A. § 8111(1)(C) renders him immune from liability on the plaintiff's state-law claims. Section 8111(1) provides in part:

> Notwithstanding any liability that may have existed at common law, employees of governmental entities shall be absolutely immune from personal civil liability for the following:
>
> . . .
>
> C. Performing or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule or resolve under which the discretionary function or duty is performed is valid;
>
> . . .
>
> The absolute immunity provided by paragraph C . . . shall be available to all governmental employees, including police officers . . . , who are required to exercise judgment or discretion in performing their official duties.

14 M.R.S.A. § 8111(1).

Discretionary function immunity under section 8111(1)(C) applies "as long as the[] conduct is not so egregious that 'it exceeds as a matter of law, the scope of any discretion [the defendants] could have possessed in [their] official capacity . . . .'" *Bowen v. Department of Human Servs.*, 606 A.2d 1051, 1055 (Me. 1992) (quoting *Polley v. Atwell*, 581 A.2d 410, 414 (Me. 1990)). In *Leach*

v. Betters, 599 A.2d 424, 426 (Me. 1991), the Law Court suggested that, where police officers act with "ill will, bad faith, or improper motive," their use of force exceeds the scope of their discretion. *See Ellis v. Meade*, 887 F. Supp. 324, 331 (D. Me. 1995) (government official entitled to discretionary function immunity where there was no persuasive evidence that conduct was motivated by ill will, bad faith, or improper motive) (citing *Leach*, 599 A.2d at 426).

The plaintiff concedes that Giroux's use of force to effect his arrest was a discretionary function. There is no evidence in the summary judgment record that Giroux clearly exceeded the scope of any discretion he could have possessed in his official capacity as a police officer. Although Giroux may have used more force than was actually necessary, there is no evidence that he acted with ill will, bad faith or improper motive. On the contrary, he never used any force he did not believe to be necessary, nor did he use any force simply to inflict pain. Accordingly, Giroux is entitled to discretionary function immunity on the plaintiff's state-law claims, with the exception of 15 M.R.S.A. § 704, which I discuss next.[4]

B. 15 M.R.S.A. § 704

The plaintiff argues that Giroux acted wantonly or oppressively, in violation of 15 M.R.S.A. § 704.[5] In *Leach*, 599 A.2d at 426, the Law Court held that police conduct was not "wanton or

[4] Section 704 imposes liability only on the arresting officer, and thus does not give rise to a cause of action against the city of Lewiston. 15 M.R.S.A. § 704. The city is immune from liability for the remainder of the plaintiff's state-law tort claims. 14 M.R.S.A. § 8103(1).

[5] 14 M.R.S.A. § 704 provides, in part: "Every . . . police officer shall arrest and detain persons found violating any law of the State . . . until a legal warrant can be obtained . . . ; but if, in so doing, he acts wantonly or oppressively, . . . he shall be liable to such person for the damages suffered thereby."

oppressive" within the meaning of section 704 because the record contained "no hint of ill will, bad faith, or improper motive." Although Giroux argues that his discretionary function immunity applies to the section 704 claim, the Law Court has left open the question of whether Maine Tort Claims Act immunity abrogates the remedy available under section 704. *Creamer v. Sceviour*, 652 A.2d 110, 115 (Me. 1995). I need not decide that issue because the plaintiff cites no evidence that Giroux acted with ill will, bad faith or improper motive. Thus, Giroux is entitled to summary judgment on the plaintiff's section 704 claim.

V. Conclusion

For the foregoing reasons, the defendants' motion for summary judgment is ***GRANTED*** in its entirety.

Dated this 22nd day of May, 1996.

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David M. Cohen
United States Magistrate Judge